No. 12,429

IN THE

United States Court of Appeals

For the Ninth Circuit

HUDSON LUMBER COMPANY (a corporation), and ELKINS SAWMILL INCORPORATED,

Appellants,

vs.

UNITED STATES PLYWOOD CORPORATION and SHASTA PLYWOOD, INC.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANTS.

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THE ISSUES.

Appellees, in their Brief, argue questions which are not the crucial issues in this case. Their argument (except for their discussion of our "waiver" point) revolves around two questions, set forth on page three of their Brief, which we summarize as follows:

1. When a contract provides for arbitration of any disagreement under it, and one party sues for declaratory relief and for an injunction *against arbitration*,

should not the action be stayed under the United States Arbitration Act?

2. When, in such a contract, the arbitration clause contains a proviso saving the right to "injunctive relief to prevent irreparable injury by reason of a claimed breach", *does a request by one party for arbitration constitute irreparable injury within the meaning of such proviso?*

We respectfully urge that these are not the questions determinative of this case.

The first stated question is not at all before the Court, because it assumes a state of facts not existing here—that is to say, rather, that it assumes that the facts stated are *all* the facts; which is not the case. True, we have here a clause providing for arbitration of all disputes; *but that is not the whole clause.* True, we have here an action which seeks a declaratory judgment against proceedings in arbitration; *but that is not the gravamen of the action.* That is merely relief which appellants seek incidentally, as a part of their main cause of action. If we limit the facts to those stated by appellees in their first point, the answer would have to be that the stay was proper. We have never contended to the contrary. But that is a point which is moot here.

The point is, whether the stay was proper where the arbitration clause contains a proviso saving the right to injunctive relief; where the injunctive relief sought is against a breach by the other party which would result in irreparable injury.

This brings us to the second question stated by appellees. This question also assumes facts which do not exist—that is to say, it assumes incorrectly that appellants' action is brought to enjoin arbitration proceedings *on the theory that a request for arbitration constitutes irreparable injury.* We have never asserted that.

What we do assert is that when the arbitration clause contains such proviso saving the right to injunctive relief against a breach resulting in irreparable injury; and when one party insists on compliance with his interpretation of a disputed provision, pending and in spite of arbitration, the other party is entitled, under such proviso, to sue for an injunction to prevent his adversary from canceling or rescinding or refusing further to perform, where such cancellation or rescission or refusal would cause irreparable injury; and that as one incident to the equitable relief of such an injunction, the Court may be asked in such action to declare the rights of the parties; and that as another incident, it may ask the Court to enjoin attempts to compel arbitration, *since, in such a case, by the terms of the proviso, there is no right to compel arbitration.*

But we have never contended that the mere request for arbitration is in itself the primary cause of irreparable injury. What we do say is that once appellants bring themselves within the proviso, they at the same time take themselves out of the general arbitration provision; in which event, to compel them to sub-

mit to arbitration in a situation in which they have not agreed to be bound by it is in itself a doing of irreparable injury, by depriving them of their day in Court. That, however, is incidental to, and a consequence of, the facts which initially take appellants out of the general arbitration clause and bring them within the proviso. See Brief for Appellants, pages 34-36, Argument III-H.

THE ARGUMENT.

1. We do not quarrel with appellees' contention that without the proviso saving the right to injunctive relief, the stay of proceedings would be proper. That, however, is not the question, for the proviso is there, and it means something, and its meaning must be given effect.

2. Appellees say that the proviso saving the right to injunctive relief does not apply to a controversy as to interpretation of the meaning of a clause in the contract. And why not? If a dispute as to such meaning puts appellants in reasonable fear of an unjustified refusal of further performance by appellees; and if such unjustified refusal would result in irreparable injury to appellants: then what clearer case is there for the injunctive relief provided for in the saving clause? The questions for decision in such a case will be: (1) Are the appellants in reasonable fear of such refusal of performance by appellees; and (2) would such refusal be unjustified; and (3) would it

result in irreparable injury to appellants. The question whether such refusal was unjustified would depend squarely on the interpretation of the contract. How then, could the Court in such an action for injunctive relief fail to be called on to interpret the contract? We cannot imagine any action for the injunctive relief mentioned in the proviso saving the right thereto, that would not involve some interpretation of the meaning of the contract at some point.

3. Appellees say, at page 11 of their Brief, that the proviso saving the right to injunctive relief clearly appears to mean that if one of the parties seeks to rescind, or refuses further to perform the contract on account of a claimed breach, the other party is not barred, if it can bring itself within the equitable rules relating to injunctions, from seeking to prevent such rescission or non-performance, *pending the determination of the controversy in arbitration proceedings.*

If we correctly understand appellees' argument in this connection, they are saying in effect: "You may sue in equity to enjoin us from wrongfully refusing to go on with performance, if you can make out your case, *but, even so, the only thing the Court can do in such a case is to give a temporary injunction against such rescisson or non-performance, while arbitrators are determining the merits of the matter.*" Even if such an equitable action can be brought, it only holds matters *in statu quo* while arbitration is proceeding. That is what we understand appellees to mean by their argument.

We reply, first, that if appellees are right in this view of the matter, they have cut the ground from beneath themselves so far as their claim of right to a stay is concerned. If that is their view, and if it is a correct view, then the issue is whether the appellants have made out a case for an injunction, and an application for a stay was not the way to test that. Indeed, the granting of the stay makes it impossible to test that question. On the proceedings for a stay, the only ultimate question is whether the parties have agreed in writing to arbitrate. If, however, the appellants are correct in saying that the proviso gives the right to an injunction in a proper case *pending arbitration,* then the granting of the *stay* pending arbitration shuts off the appellants from the chance of establishing the very right which appellants' argument admits they may establish if they can.

Secondly, we reply that it is strange doctrine to say that a court of equity can be limited by contract to the mere policing task of holding matters *in statu quo,* while arbitrators declare the rights of the parties. True, under the Arbitration Act, the parties can, by their agreement, *exclude themselves* from access to the Courts by binding themselves to submit to a conventional arbitration tribunal. But that is a far cry indeed from saying that the parties can by contract *restrict the power of the Court, once they get into it.* If their contract has left them free, in any case or under any circumstances, to ask a court of equity for the relief which courts of equity traditionally give, then we find it difficult to believe that their contract may provide further that the Court may do only

certain restricted things. The power of a court of equity, once it has taken jurisdiction of a matter, to give all the relief and decide all the questions necessary under the exigencies of the case, is traditional and unquestionable. It is one thing to say that the parties may contract *themselves* out of the right of entering such a Court; but it is quite another to contend that they may contract *the Court* into a restricted sphere of action, once they get into it.

4. The appellees do not agree with our suggestion that the general arbitration clause contemplates something in the nature of appraisal, rather than true arbitration. That suggestion of ours was made as a possible solution of the problem of reconciling the sweeping general language of the first portion of the arbitration clause with the apparently inconsistent and contradictory language of the proviso saving the right to injunctive relief. We were attempting to follow the rule of construction of contracts, mentioned in appellants' Brief, requiring that, if reasonably possible, conflicting provisions in a contract be reconciled. It seemed, and now seems to us, that by treating the general arbitration provision, despite its sweeping language, as a provision for mere fact finding, appraisal or measurement by so-called arbitrators, the two contradictory provisions could be brought into reasonable reconciliation.

Appellees make no suggestion concerning the meaning of the proviso or its reconciliation with the general provision, other than the one on page 11 of their Brief, next above discussed by us, in which they suggest that a party is not barred from seeking injunctive relief

if it can, pending the determination of the controversy in arbitration. For the reasons above stated, we think appellees' suggestion is as open to objections as ours, if not more so.

Maybe the conflicting provisions will have to be reconciled on some other basis which has not occurred to appellees' counsel or ourselves.

Of this, however, we feel confident: that proviso, saving the right to seek injunctive relief, meant something. Appellees themselves say it was explained by appellants' negotiator as contemplating a case where the seller might "divert the cedar logs" (that is, refuse further deliveries). Wherever such a case arises or is threatened, it seems to us, in all reason, that arbitration is no longer the compulsory remedy.

5. Appellees argue that they have not waived the right to arbitration (assuming that they otherwise would have been entitled to insist upon it). In this argument they emphasize the "default-in-arbitration" cases; and dismiss the two cases cited by us on waiver by inconsistent acts, as being not in point. Of course, we do not claim that appellees are in default in arbitrating in the sense that they have ever expressly refused to arbitrate after being asked to do so. The authorities cited by us in this connection were intended to illustrate that *conduct* inconsistent with arbitration can deprive a party of the right to insist on it. That conduct may consist of delay (as in the case of *La Nacional Platanera S.C.L. v. North American Fruit & Steamship Corporation*, C.C.A. 5th, 84 F. (2d) 881, to which appellees devoted considerable dis-

cussion to show its dissimilarity to this case. We did not cite it as a case similar in its facts, but to illustrate the principle that certain kinds of conduct may deprive a party of the right to arbitration); seeking a remedy inconsistent with arbitration (as in *Young v. Crescent Development Co.*, 240 N.Y. 244, 148 N.E. 510); or refusing to leave matters *in statu quo*, pending arbitration (as in *Winsor v. German Savings & Loan Society*, 31 Wash. 365, 72 Pac. 66). The case last cited is most similar to the present situation, because the letter from appellees' counsel "insisting" that payments be kept up by appellants pending arbitration, was tantamount to a refusal to leave matters *in statu quo* because it carried an implicit threat of reprisal if the payments were not so made.

6. Finally, we wish respectfully to point out that the authorities cited by appellees, while some of them contain sweeping and strong language (notably the *Shanferoke* case, 293 U.S. 449, 55 Sup. Ct. 313, 79 L. Ed. 583), are cases of general, unlimited arbitration clauses, containing no proviso saving the right to injunctive relief, as does the provision before the Court here.

Dated, Oakland, California.
March 22, 1950.

Respectfully submitted,
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